

1 Hon. Karen A. Overstreet  
2 Chapter: 11  
3 Location: Seattle  
4 Hearing Date: December 20, 2013  
5 Hearing Time: 9:30 a.m.  
6 Response Date: December 13, 2013  
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11 UNITED STATES BANKRUPTCY COURT  
12 FOR THE WESTERN DISTRICT OF WASHINGTON  
13 AT SEATTLE  
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16 In re

17 NO. 13-20151-KAO

18 JACOB BUTTNICK,

19 Debtor.

20 FAIRVIEW INVESTMENT FUND I, LLC'S  
21 RESPONSE TO RECEIVER'S MOTION TO  
22 APPROVE ACCOUNTING, AWARD  
23 COMPENSATION, CLARIFY TITLE TO  
24 ASSETS AND GRANT RELIEF FROM  
25 STAY WITH LEAVE TO CLOSE  
26 RECEIVERSHIP PROCEEDINGS

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FAIRVIEW INVESTMENT FUND I, LLC'S RESPONSE TO  
RECEIVER'S MOTION TO APPROVE ACCOUNTING,  
AWARD COMPENSATION, ETC. - 1

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1                   **I. INTRODUCTION AND RELIEF REQUESTED**

2                 In its Motion to Approve Accounting, Award Compensation, Clarify Title to Assets and  
3                 Grant Relief from Stay with Leave to Close Receivership Proceedings (the “**Motion**,” Dkt. No.  
4                 19, Aebig & Johnson Business Resolutions LLC (“**AJBR**,” or the “**Receiver**”) seeks not just  
5                 allowance, but also payment from funds held by the Receiver, of the Receiver’s compensation  
6                 and the compensation of its counsel, Bucknell Stehlik Sato & Stubner, LLP (“**BSSS**”).

7                 Most of the funds in question constitute the collateral of Fairview Investment Fund I,  
8                 LLC (“**Fairview**”) pursuant to three deeds of trust. At most, the Receiver and BSSS are entitled  
9                 to an administrative expense claim that would fall behind Fairview’s secured claim on its  
10                collateral. Accordingly, and although Fairview does not object to *allowance* of the Receiver and  
11                BSSS’s reduced compensation at this time, Fairview respectfully requests that *payment* not take  
12                place and that the funds held by the Receiver be turned over in full and sequestered pending  
13                further order of this Court.

14                   **II. BACKGROUND**

15                 Jacob Buttnick (the “**Debtor**”) filed a voluntary Chapter 11 petition on November 20,  
16                 2013 (the “**Petition Date**”). At the time, a receivership was pending in King County Superior  
17                 Court, wherein AJBR had been appointed general receiver over the Debtor’s property, including  
18                 property that the Debtor had assigned to AJBR pursuant to an assignment for the benefit of  
19                 creditors executed on June 20, 2013. *See* Motion Exhibits 1 & 2 (Dkt. Nos. 19-1 & 19-2).

20                 On November 26, 2013, the Receiver filed the Motion, seeking, among other things, an  
21                 order approving the payment, in a reduced amount, of its pre-petition fees and expenses and the  
22                 fees and expenses of its counsel. The Receiver proposes to pay these fees and expenses out of  
23                 the funds held by the Receiver before turning the balance of the funds over to the bankruptcy  
24                 estate. *See* Proposed Order (Dkt. No. 19-10). These funds consist mostly of rental proceeds  
25                 from property of the estate located at 201 First Avenue South in Seattle (the “**J&M Property**”).  
26                 *See* Motion at 11.

1 The J&M Property serves as collateral for several loans, including three loans to which  
2 Fairview has succeeded as assignee of the original lenders. Declaration of Nels Stemm (“**Stemm**  
3 **Declaration**,” submitted concurrently herewith) ¶ 3. Specifically, Fairview is the assignee of the  
4 secured loans originally made by the U.S. Small Business Administration, Bel Air & Briney, and  
5 Rachel Briney. *Id.*; *see also* Proof of Claim No. 4. The secured status of these loans is not  
6 disputed. *See* Motion Exhibit 1 (Dkt No. 19-1) at 5-6. Furthermore, the deeds of trust  
7 evidencing these loans make clear that the collateral includes the rents from the J&M Property.  
8 *See* Stemm Declaration ¶¶ 4-6 & Exhibits A-C. In other words, Fairview, as assignee of the  
9 original beneficiaries of the deeds of trust, has a secured claim on all rental proceeds collected by  
10 the Receiver from the J&M Property.

11 As a secured creditor with a claim on all rents, Fairview objects to the payment of the  
12 Receiver and BSSS's requested compensation before secured claims, including Fairview's, are  
13 paid. To that end, Fairview does not object to first-priority payment of the claims of other  
14 secured creditors who establish a senior entitlement to rents. *See id.* ¶ 7. However, and as  
15 further set forth below, Fairview submits that the allowed compensation of the Receiver and  
16 BSSS is entitled at most to *administrative priority* status. Accordingly, Fairview respectfully  
17 requests that payment of the Receiver and BSSS's compensation, to the extent it is allowed, not  
18 be authorized at this time.

### **III. ARGUMENT AND AUTHORITY**

As an initial matter, there can be no doubt that as of the Petition Date, exclusive jurisdiction over the assets that made up the receivership estate passed to the Bankruptcy Court to administer in accordance with the Bankruptcy Code. See *In re Sundance Corp., Inc.*, 149 B.R. 641, 650 (Bankr. E.D. Wash. 1993) (“[R]eceivership property becomes property of a bankruptcy estate upon filing of a petition, [so] control and decisions affecting the receivership assets which were formerly *in custodia legis* of the state court come under and become the domain of the bankruptcy court.”).

1 Compensation of state court receivers and their professionals in bankruptcy is governed  
2 by Sections 503(b)(3)(E), 503(b)(4), and 543(c)(2) of the Bankruptcy Code. The first two  
3 sections bestow *administrative priority* status upon: (a) the “actual, necessary expenses . . .  
4 incurred by . . . a custodian superseded under section 543,” (b) the “compensation for the  
5 services of such custodian,” and (c) “reasonable compensation for professional services rendered  
6 by an attorney” of such custodian. 11 U.S.C. §§ 503(b)(3)(E); 503(b)(4); *see also In re 245*  
7 *Assocs.*, LLC, 188 B.R. 743, 748 (Bankr. S.D.N.Y. 1995) (“Section 503(b)(3)(E) grants the  
8 superseded receiver an *administrative claim* for his actual, necessary costs and expenses, and for  
9 his compensation, and section 503(b)(4) covers the reasonable compensation payable to the  
10 superseded custodian’s attorney or accountant.”) (emphasis added). The elevation of a receiver  
11 and its professionals’ pre-petition compensation to administrative priority status is an exception  
12 to the general rule that administrative expenses under 11 U.S.C. § 503 are only payable if they  
13 were incurred *after* the filing of the debtor’s bankruptcy petition. *In re Snergy Props., Inc.*, 130  
14 B.R. 700, 704 (Bankr. S.D.N.Y. 1991).

15 The third section, Section 543(c)(2), “deals with certain of the receiver’s post-petition  
16 services,” 245 Assocs., 188 B.R. at 748, and its applicability is “limited to the ‘winding up’  
17 duties imposed under sections 543(a) and (b).” *Id.* (citing *In re Posadas Assocs.*, 127 B.R. 278,  
18 281 (Bankr. D.N.M. 1991)). These sections deal with turnover of property by a custodian to the  
19 trustee, and some courts have held that the costs of turnover are also entitled to *administrative*  
20 *priority* status. *See In re Posadas Assocs.*, 127 B.R. at 281-82.

21 Here, even though Section 543(c)(2) only deals with the costs of turnover—and even  
22 though compensation for a receiver’s pre-petition services is entitled at most to administrative  
23 priority status, *already* constituting an exception to the general rule that only post-petition  
24 expenses get priority status—the Receiver and BSSS assert that they are entitled under Section  
25 543(c)(2) to immediate payment of *all* requested compensation. However, the funds from which  
26 the Receiver proposes to pay this compensation appear to consist of rents subject to Fairview’s

1 secured claim, and administrative expense claims do not have priority over secured claims.  
2 *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 4 (2000).  
3 Accordingly, the Receiver and BSSS, who are administrative claimants, are not entitled to  
4 receive payment from rent proceeds until secured claims, including Fairview's are paid. The  
5 Receiver has cited no authority to the contrary.

6 **VI. CONCLUSION**

7 For the foregoing reasons, Fairview respectfully requests that payment of the Receiver  
8 and BSSS's compensation, to the extent allowed, not take place until claims have been evaluated  
9 and administered in this bankruptcy proceeding, and only upon further order of this Court.

10 DATED this 12th day of December, 2013.

11 CAIRNCROSS & HEMPELMANN, P.S.  
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